No. 2607

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. B. BISTLINE, PLAINTIFF IN ERROR

vs.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

Brief for Defendant in Error

J. L. McCLEAR,
United States Attorney, District of Idaho,
and
J. R. SMEAD,
Assistant U. S. Attorney, District of Idaho,
Attorneys for Defendant in Error, Residence, Boise, Idaho.

CAPITAL NEWS JOB ROOMS, BOISE

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. B. BISTLINE, PLAINTIFF IN ERROR

vs.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

Brief for Defendant in Error

J. L. McCLEAR,
United States Attorney, District of Idaho,
and
J. R. SMEAD,
Assistant U. S. Attorney, District of Idaho,
Attorneys for Defendant in Error, Residence, Boise, Idaho.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. B. BISTLINE, PLAINTIFF IN ERROR

vs.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

Brief for Defendant in Error

STATEMENT OF THE CASE.

Since the statement of the case set forth in the brief of plaintiff in error appears to us to be sufficient for the purposes of this appeal, we make no additional statement at this time.

We except from what we have just said concerning the statement of the case by plaintiff in error the third and fourth paragraphs appearing upon page 2 of his brief. Referring to the third paragraph upon that page, we state the facts to be that in the former suit in equity in which it was sought to establish title to the lands in question in the United States as against the claims of title theretofore made by plaintiff in error, *no* issue of title was joined for the reason that by his answer in that suit plaintiff in error specifically disclaimed title or interest in said lands. We further state that the "decree" in said

paragraph referred to as a decree absolute, unconditional and without reservation, was in fact nothing more or less than an order of dismissal based upon the voluntary motion of the United States, and not pursuant to any hearing of that suit upon its merits, and not intended as a final adjudication of the cause in any sense of the term.

Referring to the said fourth paragraph, we deny that the case at bar is based upon the identical state of facts alleged in the former suit in equity. We state the fact to be that the present case is based upon the same facts alleged in the former suit in equity and in addition thereto the further facts of sale and conveyance of the lands involved by plaintiff in error to third parties, purchasers for value without notice, said sale and conveyance having been made prior to the time of commencing the former suit in equity, and said former suit having been commenced by the agents of the United States in ignorance of the said facts of sale and conveyance of said lands to innocent third parties.

Other than the exceptions just set forth, we accept the statement of the case made by plaintiff in error, and proceed to the argument without further comment.

ARGUMENT.

Plaintiff in error has subdivided his argument under three general headings, and we feel that we can do no better than to follow the same arrangement. Accordingly, our argument is here presented in three divisions, to-wit: (I.) Sufficiency of Complaint, (II.) Election of Remedies, and (III.) Res adjudicata.

I.

The limitation set forth in Section 8 of 26 Stat. 1093 does not apply to an action for money damages based upon fraud perpetrated by an entryman in the securing of his patent, nor should such limitation be invoked by analogy or parallel reasoning.

In the absence of an Act of Congress to the contrary, it is incontestably the rule that no limitation as to the time for commencing any action is imposed upon the sovereign power. Congressional intent to the contrary must be *clearly* manifested.

> United States vs. Railroad Company, 118 U. S. 120, 126.
>
> United States vs. Insley, 130 U. S. 266.
>
> United States vs. Jones, 218 Fed. 973.

While plaintiff in error, at page 11 of his brief, disavows any intent to rely directly or specifically upon a statute of limitation in this matter, yet it is manifest upon reading his brief upon the first branch of his argument, that he nevertheless would have this Court say that Section 8, 26 Stat. 1093, should be held to operate as a bar to this action. That section refers specifically and unequivocally to "suits to vacate and annul patents." No other style or variety of suit or action is mentioned or referred to. There is nothing in the language of the statute to indicate that Congress intended anything more than merely to set a time after which title to real estate originating in a patent from the United States should become permanently vested. Most assuredly Congress has not, in this statute, manifested "clearly" an intent that the phrase "suits

to vacate and annul patents" should be by the courts construed to include also actions at law to recover money damages for fraud, merely. In this connection, it will be observed that throughout the procedure of Federal Courts there is maintained the traditional distinction between a "suit" in equity and an "action" at law, which distinction has in the main been observed by Congress in the drafting of statutes.

On this phase of the argument, plaintiff in error relies principally upon *United States vs. Winona R. R. Co.*, 165 U. S. 463. While the statute here in question was not passed until after the commencement of the last mentioned case, the Supreme Court refers in its opinion to the statute for the purpose of arriving at the general governmental policy touching questions involving the validity of title to land. The whole reasoning of the Court is premised upon equitable considerations arising out of the lapse of time since the granting of the titles involved in the case, and also arising out of the *absence* of fraud on the part of the railroad company, grantee. Not only does the fact that the case at bar is for money damages only, and wholly founded upon fraud, distinguish it from *United States* vs. *Winona R. R. Co.*, but also a reading of the opinion in that case will disclose that the Court intended merely to comment upon the propriety of that action in view of the great lapse of time and the *absence* of any fraud on the part of the government's grantee. Preliminary to the controlling portion of its opinion, the court, on page 475 of the reported case, says:

> "Many years have passed since the certification, and since the company, in reliance upon the title it believed it had acquired, has disposed of the lands and other parties have become interested in and have dealt with the lands

> as private property. Contracts have been entered into, suits maintained—carried even to this Court—and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed. Surely, after such a lapse of time and after so many transactions in and in respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the Courts."

Following immediately after the quotation just given, the court in speaking of the question of limitation as applied to the action, says:

> "The lapse of time would be no bar, for statutes of limitation cannot be invoked against the government."

It plainly appears, therefore, that the Court was not construing or applying any statute of limitation, but was, as we have just stated, commenting upon the propriety of the action as viewed from the standpoint of equity.

Plaintiff in error, on page 15 of his brief, has quoted at length from the authority under discussion. He has not, however, repeated enough of the text of the opinion to show the true purport and meaning of the portion set out in his brief. We will, therefore, add the concluding words of that portion of the opinion, which should be read together with the quotation on page 15 of plaintiff's brief, in order to get the true meaning thereof:

> "The Act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that Act. It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress *to uphold titles* arising under certification or

> patent by providing that after a certain time the government, the grantor therein, should not be heard to question them."

When, therefore, the whole of what the Court has to say in this matter is referred to, it appears very plainly that the Court was speaking of nothing else than the desirability of disturbing titles which had in good faith vested many years previous.

The plaintiff in error also relies upon *United States* vs. *Chandler-Dunbar Co.*, 209 U. S. 447. Upon a casual reading of that case it is true that certain language used by the Court might seem to have some application to the case at bar. But we submit that upon more mature consideration it will be discovered that the language there used was not intended to have any such force or effect as contended for by plaintiff in error. It will be observed that while the statute (Section 8, 26 Stat. 1093) in terms refers only to "suits to vacate and annul patents," the suit in *United States* vs. *Chandler-Dunbar Co.* was in form a suit brought to quiet title. There is, in equity, a considerable distinction ordinarily to be observed between a suit to cancel an instrument affecting title to land, and a suit to quiet title to land. This distinction exists as to the allegations required to be made in the bill, as to the proof to be adduced in support of such allegations, and as to the form and effect of a decree in conformity to such allegations and proof. A decree of cancellation would ordinarily result only in the annulling of a given written instrument, the cancellation of which might, or might not, affect title to land. A decree in a suit to quiet title would always specifically declare and establish in some claimant a vested title to land. In the authority under discussion the government evidently sought to avoid the bar of the statute affecting suits to vacate and annul pat-

ents, by bringing an action in the form of an action to quiet title merely. That is, the government evidently made the contention that the statute affected only the particular *remedy* specified, namely, a suit to cancel patent and when the Court says, on page 450 of the reported case,

> "in form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. This statute must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place,"

it is intended merely to state that after the expiration of six years the government is barred from asserting title to patented lands, whether its title is asserted in a suit for cancellation, in a suit to quiet title, or in any other suit brought upon a claim of *title*. The Court does not say, nor should its opinion be construed to mean, that not only are all claims of *title* in the government barred, but also, that the statute bars an action at law for damages, based, not upon a claim of *title*, but upon the grantees *fraud* in the acquisition of *his* title. The case at bar is the antithesis of a suit founded on a claim of title. It *affirms* the *defendant's* title.

Accordingly, the opinion just discussed has been construed, in the case of *United States* vs. *Pitan* not to bar an action for damages for fraud in the acquisition of title brought more than six years after the issuance of patent.

> United States vs. Pitan, 224 Fed. 604.
> (See Fed. Reporter Advance Sheets for Sept. 16, 1915.)

The case just cited is a case identical with the case at bar, in

which are discussed the leading authorities on this question of limitation as cited both in our brief and in the brief of plaintiff in error. We respectfully refer this Court to the opinion of that case as setting forth the true doctrine to be observed in deciding this appeal.

Plaintiff in error insists that in recovering money damages for fraud on the part of an entryman, the government recovers that which is equivalent to the land itself, and concludes therefrom that to allow the judgment in the case at bar to stand would be to allow the government to accomplish indirectly that which it cannot do directly. We submit, without citation of authorities, that at no time in the history of English law has the money value of land been considered the equivalent of the land itself. The jurisdiction of courts of equity has always been based very largely upon the undisputed proposition that money damages representing the value of land are *not* the equivalent of the land itself, and that since *at law* only money damages for the loss of land could be obtained, the Courts of law furnished no adequate remedy for such loss. Hence, in matters pertaining to the performance of contracts conveying, or to convey, land, in matters requiring injunctive relief for the protection of land, and other equally familiar forms of procedure, the courts of equity have had jurisdiction to give specific relief by compelling the performance, or the cancellation, of such contracts, and by preventing injury threatened to be done to land. Under the facts of the case at bar, the lands in question having passed to innocent purchasers for value, the government could not obtain this equitable relief by cancelling patent and thus obtaining a return *in specie* of the land conveyed. It was compelled, therefore, to resort to

the inadequate substitute of an action at law for money damages measured by the value of the land. We submit that this is by no means the equivalent of the land itself.

We further submit without citation of authority, which citation we deem to be in this Court unnecessary, that it is a rule very generally followed in framing of statutes of limitation, that in actions based upon fraud the period of limitation does not start to run until the discovery of the fraud. It is not only reasonable to assume, but it is almost the inevitable assumption, that fraud committed by an entryman in his final proof, as in this case, would not be discovered for some little time, and possibly for a long time, after the patent had issued. The vast extent of public lands open to entry in the United States, their distance from the centers of population and the usual modes of travel, and the tremendous amount of clerical work and of field inspection to be done in connection with the entries upon the public domain and in pursuit of an inquiry calculated to disclose the facts tending to prove the truth or falsity of the final proof in the case of such entries, all plainly distinguish the situation from that of a private owner whose lands would probably be separated by a few miles at most. In view of this condition, it is reasonable to assume, that, had Congress intended the statute under discussion to impose a limitation upon actions brought for fraud, it would at least have made the usual provision that such limitation should not commence to run until the discovery of fraud.

We respectfully submit that plaintiff's objections to the sufficiency of the complaint in this case are not well founded.

II.

There can be no election of remedies in such a sense that the commencement of one action, which is subsequently dismissed upon plaintiff's own motion, constitutes a bar to a second action founded upon a more complete knowledge of the facts involved, unless AT THE TIME OF COMMENCING THE FORMER ACTION there existed a state of facts upon which either form of action would have been properly founded.

* * * * *

Plaintiff in error contends that by commencing the former suit in equity for the purpose of establishing title in the United States as against plaintiff in error, the United States exercised its option to choose between two existing remedies appropriate to the same state of facts, and was, therefore, estopped by the order of dismissal in the former suit to prosecute an action at law for damages based upon fraud in obtaining patent to the lands in question.

There is no question that his general proposition is legally correct. A litigant having open to him two forms of action, inconsistent with each other, each based upon and involving the same facts, is bound to choose the one and abandon the other. But it is also true that, to state the converse of the rule of election, where a *choice* of remedies does not exist, there can be no election. That is merely to say that where the facts of a given situation will support only one form of action, there is afforded no opportunity to resort to the rule of election of remedies for the very sufficient reason that no *choice*, that is, no election, is possible. The very term itself presupposes the existence of two or more things or objects, out of which to select one. The inquiry, therefore, in the case at bar relates to

the number of remedies or forms of action which, under the *then* existing facts, were open to defendant in error.

The bill in the former suit was filed April 10, 1911. (Trans., p. 35). The answer of plaintiff in error to that bill in paragraph 8 thereof, discloses that in September and November previous to the filing of the bill the land in question, which was exclusively the subject of the litigation, had been transferred to third persons who were not parties to that suit. (Trans., p. 49). The fact of this conveyance to third persons some months prior to the filing of the government's bill is alleged in the present action (Trans., p. 10), and is further proven by the record in the case at bar, wherein the deeds consummating such conveyance were introduced in evidence (Trans., p. 34). Therefore, at the time the former suit was commenced, there was not *in fact* any remedy open to the United States by way of divesting plaintiff in error of his title. No matter how fraudulent his final proof had been, he held a good and valid *legal* title until such time as he was divested of the same by the decree of a Court of competent jurisdiction. Prior to the commencement of an action for the purpose of obtaining such a decree, he had conveyed that title to third persons, who were presumptively innocent of any fraud or knowledge of fraud which would invalidate the original patent. Therefore, the *one and only* form of action and remedy open to the United States was a simple action at law for money damages, based upon fraud in obtaining patent to said lands.

Under such a state of facts, it is futile to talk of an election of remedies. There was no *choice* to be made. It was said of the English navy of a former time that through every rope and cable upon its vessels ran a single strand of red. So through-

out all of the law announcing the doctrine of election of remedies we find, in each instance where the rule has been applied, the element of *choice;* two or more forms of action open to the plaintiff. Thus, in the authorities contained in the brief of plaintiff in error we find the following:

> "The doctrine of election means that where two inconsistent remedies *are presented to the choice of a party*," etc.
>
> Peters vs. Bain, 133 U. S. 670.

> "An election once made, with knowledge of the facts, between *co-existing* remedial rights," etc.
>
> "In re Garver, 68 N. E. Rep. 667.

> "A party may not take contradictory positions; and when he has a right to *choose* one of *two* modes of redress," etc.

and

> "His deliberate and settled choice of *one*, with knowledge or means of knowledge of such facts as would *authorize a resort to each*," etc.
>
> Robb vs. Vox, 155 U. S. 13.

And as in the foregoing quotations, so in all of the authorities cited by plaintiff in error, it will be observed that each presupposes the existence, *at the time of commencement of the first action*, of two or more forms of action, each equally supported by the *then* existing facts.

In this connection, we call the Court's attention to *Brown vs. Fletcher*, 182 Fed. 936, decided by the Circuit Court of Appeals of the Sixth Circuit, which is decisive of the case at bar in holding, as we have just submitted, that no election can be said to be made unless at the time of filing of the first action,

two or more forms of action are equally open to plaintiff. The opinion in this authority cites case after case from the various Federal Courts, as well as from the highest Courts of many states, all to the same effect. We respectfully request a careful reading of this authority by this Court, inasmuch as it states the law pertinent to the question here involved fully and in much better form than any of which we feel capable.

What has been already said in this, the second branch of the argument, we submit should be decisive on the question raised for the reason that the facts of this case show that no election was open to the United States, and that the former suit in equity was filed in ignorance of the conveyance of the lands in question to innocent purchasers for value. However, plaintiff in error contends and argues at length that the trial court erred in refusing to instruct the jury that in making an election of remedies, the means of knowledge would be the equivalent of actual knowledge. In support of this contention, plaintiff in error insists that the United States was bound by constructive notice given by the recording of the deeds conveying the lands to third parties and by the possession of such lands by such parties pursuant to such deeds.

In answer to this contention, we submit that the trial Court's error, if any was committed, was not in the instructions given the jury, but was committed in ever submitting the plea of election of remedies to the jury at all. Without repeating what we have said above concerning the matter, we reiterate that the undisputed facts show that when the former suit in equity was commenced, the title to the lands had passed to innocent third parties and that the United States had not, as a matter of fact, any cause of action to be brought against plaintiff in error for

the purpose of divesting him of title. The reason being, that at that time he had in fact no title, and the only remedy open to the government was an action at law to recover damages for his fraud. And since, in the case at bar, defendant's own exhibit B, (Trans., p. 43) and the three deeds to the third parties in question offered by the government (Trans., p. 34) showed those facts conclusively, the Court should have ruled that, as a matter of law, the United States did not, at the time of filing the former equity suit, have any election of remedies open to it, and should, therefore, have refused to submit the question to the jury. There was no dispute about these facts, and, therefore, there was no issue of fact to be passed on by the jury. The trial courts error, therefore, did not prejudice plaintiff in error, but, on the contrary, operated to his benefit. It left open to him an issue from which under the undisputed facts of the case he should have been foreclosed.

Assuming, however, for the sake of argument, that there was an issue of fact on the question of election of remedies, the trial Court's instruction on that subject, (Trans., p. 55), was ample. It placed before the jury for their consideration everything which, as a matter of law, should have been considered in arriving at their verdict. The only matters of which plaintiff in error contends he lost the benefit, are the two rules of law which impute constructive notice from recording of deeds and from the possession of the lands in question by the purchasers, respectively.

So far as constructive notice is concerned, it will be borne in mind that it is strictly a creature of the recording acts. No person is bound by constructive notice except those named in such acts. The act governing the recording of these deeds is to be found in the *Idaho Revised Codes*, Section 3159.

> "Every conveyance of real property, acknowledged or approved, and certified, and recorded as prescribed by law, from the time it is filed with the Recorder for record, is constructive notice of the contents thereof to *subsequent purchasers and mortgagees.*"

The United States was neither a subsequent purchaser nor a mortgagee. Its rights were not only antecedent to the deeds given the purchasers of the lands in question, but were antecedent to those of plaintiff in error. The lands had been owned by the United States from the date of their acquisition as a part of the public domain. And, assuming that the sovereign is ever subject to the constructive notice provided for in the recording acts of a State, it would not, as a holder of antecedent rights, be in any way bound to take notice of the deeds in question.

> "It is a fundamental proposition, therefore, established with complete unanimity, that a registration properly made does not operate as constructive notice to all the world, but only to those persons who, under the policy of the legislation, are compelled to search the records in order to protect their own interests. It is equally well settled that such record is not notice to the holders of antecedent rights—that is, to those who have acquired their rights before the time when the record is made—and this is so even when the antecedent right may, in pursuance of the statute, be defeated by the fact of prior record. In other words, the registration of an instrument does not act *as a notice backwards* in time."
>
> Pomeroy Eq. Jur., Sec. 656 and 657.

> Record notice arises only pursuant to wording of recording acts. When only *subsequent* parties are named in the act, there is no constructive notice to those whose rights antedate the recording.
>
> Stuyvesant vs. Hone, 1 Sand. Ch. 419.

The same is true as to notice constructively given by the possession of a purchaser of land. Such notice runs only to those claiming subsequently acquired rights. For the reasons given above, the United States was not obliged to take notice of the possession of the purchasers of these lands, inasmuch as its rights were antecedent to theirs.

Further, it has been held in a case directly in point that the United States is not bound in the matter of the disposal of the public domain to make the same investigation and inspection of the lands in question that a private person might be required to do. In *United States* vs. *Minor,* 114 U. S., 233, on page 239 *et seq.* the Supreme Court says:

> "Is there any reason to be found in the relation of the government to such a case as this which will deprive it of the same right to relief as an individual would have? On the contrary, there are some reasons why the government in this class of cases should not be held to the same diligence in guarding against fraud as a private owner of real estate. The government owns millions and millions of acres of land, which are by law open to homestead, pre-emption, public and private sale. The right and title to these lands are to be obtained from the government only in accordance with fixed rules of law. For the more convenient management of the sales of these lands, and the establishment by individuals of the inchoate rights of pre-emption and homestead, and their final perfection in the issuing of a title called a patent, there is established in each land district an office in which there are two officers, and no more, called register and receiver. These districts often include twenty thousand square miles or more, in all parts of which the lands of the government subject to sale, pre-emption and homestead are found. These officers do not, they cannot visit these lands. They have maps showing the location of the government lands, and their sub-division into townships, sections and parts of sections, and when a person desires to initiate a claim to

any of them, he goes before them and makes the necessary statement, affidavits and claims, of all which they make memoranda and copies, which are forwarded to the General Land Office at Washington.

"For the truth of these statements they are compelled to rely on the oaths of the parties asserting claims, and such ex parte affidavits as they may produce.

"In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly ex parte. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the government except in a few rare instances, to know anything of the truth or falsehood of their statements. In the cases where there is no contesting claimant there is no adversary proceedings whatever. The United States is passive; it opposes no resistance to the establishment of the claim, and it makes no issue on the statement of the claimant.

"When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of the land of which it has been defrauded by these means, should have remedy against that fraud—all of the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced."

So that, again assuming, for the sake of the argument, that the question of election or remedies was properly a matter to be passed on by the jury, it fully appears that the instruction in question placed before jury all the pertinent facts.

In view of the fact that the suit in equity was voluntarily

dismissed upon the filing of an answer setting up the conveyance to third persons and disclaiming any interest in the lands in question, and in further view of the fact that the three deeds before referred to showed conclusively the conveyance of these lands long before the equity suit was commenced, the jury very properly concluded that the United States Attorney obtained knowledge of the rights of these purchasers for the first time, when the answer to the bill in equity was filed. The jury further properly found that at the time of commencing the suit in equity there was in fact no election open to the United States, on account of the fact that the lands had already been conveyed to innocent third persons. Therefore, they could not find otherwise on the special plea of election of remedies than against plaintiff in error.

We submit that under the facts of this case the defendant in error cannot be said to have made an election of remedies by the filing of the former suit in equity.

III.

Before a matter becomes res adjudicata so as to constitute an estoppel or a bar to a second action, the matter must be considered upon its merits. When a suit is instituted in ignorance of material facts which are fatal to its continuance, and such suit is afterwards, upon learning such facts, dismissed to make way for a different form of action properly founded upon all of the facts involved, such dismissal does not constitute res adjudicata.

* * * * *

Plaintiff in error contends that the commencement in 1911 of a suit in equity brought by the United States against plaintiff in error to cancel the patent theretofore issued to him, and

the subsequent dismissal of that action upon the motion of the then United States Attorney, amounted to *res adjudicata* and should be held to bar the present action at law for damages based upon fraud committed by plaintiff in error.

The facts are that at the time of commencing the former suit in equity, the attorneys for the United States believed that upon alleging the filing by the homestead entryman, his final proofs, and the facts constituting fraud in such final proofs, they had stated *all* of the ultimate facts involved in the case (defendant's Exhibit A, Trans., p. 35). That in answer to those allegations, defendant, now plaintiff in error, after denying the allegations of fraud, alleged as a further defense the conveyance of the lands involved to third persons not parties to the suit, and that "this defendant, therefore, alleges that he disclaims any interest whatever in or to any of said lands or any part thereof." (See defendant's Exhibit B, Trans., p. 42). That upon ascertaining that the aforesaid conveyances to innocent third persons, purchasers for value, had been made, the then United States Attorney moved that the said suit be dismissed and that by reason of such motion, and for that reason alone, the court accordingly dismissed the action. (See defendant's Exhibit D, Trans., p. 53).

Plaintiff in error states, on page 19 of his brief, that in the former suit in equity "a decree upon the *merits of the issues joined* was duly made," etc. This is patently a misapprehension of the meaning and effect of the order dismissing the action, above referred to as defendant's Exhibit D. The text of this order is as follows:

> "This cause came on regularly for hearing before the Honorable F. S. Dietrich, Judge of the above entitled

> Court, the plaintiff appearing by C. H. Lingenfelter, United States Attorney and Solicitor for Complainant, and upon motion of the Solicitor for the Complainant, said suit is dismissed.
>
> "Wherefore, by reason of the *premises*, it is ordered, adjudged and decreed that said suit be dismissed and that the plaintiff take nothing by said action."

The "premises" upon which the order dismissing the suit was made are set forth in the order above quoted, and are the motion of the United States Attorney. Nothing more. No mention is made of any hearing upon the merits, nor of any evidence received and taken under consideration, nor, in short, of any reason for dismissal appearing either from the facts involved or in the law pertaining thereto. It is more than apparent that the dismissal of this suit in equity was absolutely *pro forma* and merely an act incidental and preliminary to the filing of the present action at law for damages on account of the fraud of plaintiff in error. This fact was fully understood by the learned Judge before whom the present case was tried, when he refused to sustain the plea of *res adjudicata* advanced by plaintiff in error. Had he, in ordering the dismissal of the former suit in equity, intended in any way an adjudication of that case upon its merits, he would have, in the present case, sustained the plea of *res adjudicata* as a matter of course.

Plaintiff in error, on page 27 of his brief, states that "there are no reservations, conditions or limitations whatever in the decree or in the record. The decree recites that said 'cause came regularly on for trial,' and so far as the record shows the trial may have been upon evidence submitted which was found to be insufficient or unworthy (Trans., p. 53)". The decree referred to does not so recite. It recites that the cause came on for *hearing*, and that, *premised* upon the motion of the

United States Attorney, the suit was ordered dismissed. Referring to the quotation from the brief of plaintiff in error, next above, this order of dismissal contains within itself the plain reservation, condition and limitation that it was made upon the motion of plaintiff, and not otherwise. The cause must have come on for "hearing" in some form or other before that motion, or any other matter touching said cause, could be entertained. It is true that the order recites "that the plaintiff take nothing by said action." On these words plaintiff in error builds up his entire argument in support of his plea of *res adjudicata*. In view of the facts disclosed by the record of the former suit, which facts we have pointed out above, the closing words of the order of dismissal become purely formal, having neither relation to, nor effect upon, the substance of the suit. To hold that under such circumstances that order should be viewed as a final determination of all the facts involved, would be to extend the effect of an otherwise righteous rule to an unreasonable limit, and to exchange the substance for its shadow.

> A judgment of dismissal based upon the voluntary action of a party is not *res adjudicata*."
>
> 23 Cyc. 1230.

> A judgment or final order in a cause is not a bar to another action unless it is made or rendered on the merits of the cause.
>
> 14 Cyc. 452.

> A dismissal which is not on the merits is usually treated as being without prejudice, although not so stated in the order.
>
> 14 Cyc. 454.

> "It must appear that a trial was had involving or at least giving full opportunity for a consideration of the case on its merits, and settling the issues alleged to be concluded by it and by the judicial decision, entered either on the findings of the Court, the verdict of the jury, or *non obstante verdicto*."
>
> 23 Cyc. 1226.

In view of the authority last quoted, it will be noted that in the former suit in equity there were neither findings, a verdict, or a judgment notwithstanding the verdiict.

It may well be urged that the exact question presented by plaintiff in error has been heretofore decided by this Court adversely to his contention. In *Southern Pacific Ry. Co.* vs. *United States*, 186 Fed. 737, it was held that a decree in a suit by the United States against a railroad company to determine its right to certain lands, in which the only question determined was that the lands did not pass to defendant under the grant, but were erroneously patented to it, is not a bar to a second suit brought to recover from the company the price of the same lands on an allegation that they had been sold by the company to bona fide purchasers whose title had already been confirmed. It will be noted that in the authority just cited not only was a suit in equity *commenced*, as in the case at bar, to annul patents already issued to the government's grantee, but also that the suit was prosecuted to a *final decree* under which it was determined that the railroad company's title was inferior to that of the United States. Subsequent to that decree a second suit was commenced to recover from the railroad company the value of the same lands on the ground that said lands had been conveyed to innocent third parties by the railroad company. The difference between the authority under dis-

cussion and the case at bar is, that in the case at bar, as soon as it was discovered that the rights of bona fide purchasers had intervened, the equity suit was dismissed and an action instituted to recover the value of the lands conveyed to such purchasers. We therefore submit that this Court has already decided the exact question involved in this appeal adversely to plaintiff in error.

We have no quarrel with the authority of the various opinions of the United States Supreme Court cited by plaintiff in error but in each and every one of such cases, as well as in all other authorities cited by plaintiff in error in support of his contention of *res adjudicata*, a reading of the same will disclose that there was a *real* joinder of the issues and a judgment rendered upon such issues joined, upon the merits of the cause. In the present case, the United States in the former suit in equity filed its bill calculated to establish title in itself and to divest plaintiff in error of any title, right or interest in the land involved (Trans., p. 35). That bill prayed that plaintiff in error be required to appear and answer the allegations of the bill (Trans., p. 42). In his answer (Trans., p. 51) plaintiff in error disclaimed any and all interest in said lands. The very gist of that suit was conflicting claims of title existing between plaintiff in error and the United States. By his disclaimer plaintiff in error neither joined nor tendered any issue. The effect of such disclaimer was exactly the opposite. It rendered impossible any issue of title between himself and the United States. Under these circumstances, the inquiry naturally arises, what matters at issue were, as plaintiff in error contends, conclusively determined by the motion of the United States Attorney and the dismissal which was ordered pursuant

to such motion? We think the question must be answered, that there were no matters so determined by that order.

Freeman on Judgments, 4th Ed. at Sec. 260, says:

> "No judgment can be available as an estoppel, unless it is a judgment on the merits."

The very best construction that could be given the order dismissing the suit in equity, would be that it was a judgment given because of a non-joiner of parties defendant, the missing parties being the purchasers from plaintiff in error as shown by his answer in the former suit (Trans., p. 49).

Freeman on Judgments, at Sec. 266, says:

> "A judgment given because of a misjoinder or non-joinder of parties plaintiff or defendant * * * * cannot defeat a subsequent suit in which the vice causing the former judgment does not exist."

Therefore, if the order relied on by plaintiff in error be given the most favorable construction, it cannot avail him, because in the second action there could be no objection of non-joinder of his purchasers. They would have been, in this action, neither necessary nor proper parties.

The same authority at Section 270 A, speaking of suits in equity says:

> "A bill may be dismissed before the hearing, on the motion of the plaintiff, upon payment of costs. Such a dismissal has no higher effect as *res adjudicata* than the voluntary dismissal of an action at law."

Again, at Section 261, he states the following rule:

> Judgments of non-suit, of *non prosequitur*, of *nolle prosequi*, of dismissal, and of discontinuance, are not *res adjudicata*.

Finally at Section 261, page 476, he discusses the exact question here involved, citing full authorities for his statements, in a manner conclusively contrary to the contentions of plaintiff in error:

> "At common law there is no form of an entry in the books of a judgment dismissing the action. Every judgment against a plaintiff is either upon a *retraxit, non prosequitur,* nonsuit, *nolle prosequi*, discontinuance, or a judgment on an issue found by a jury in favor of defendant, or upon demurrer. The inducements or preliminary recitals in these several kinds of judgment are variant, but the conclusion in each is always the same; it is as follows: 'Therefore, it is considered by the Court that plaintiff take nothing by his writ, and that the defendant go without day, and recover of plaintiff his costs.' Of these several judgments, none but a *retraxit* or one on the merits will bar subsequent actions."

The proceedings of Federal Courts in equity suits are in general those, or the equivalent of those, at common law. Therefore, in view of the authority just cited, the order of dismissal relied upon by plaintiff in error cannot be construed as a final judgment so as to constitute *res adjudicata.* It shows upon its face that it is not a judgment founded either upon the verdict of a jury, the findings of a Court, or upon demurrer, and most assuredly it contains none of the elements of a *retraxit.* It must be held either a *non prosequitur* or a discontinuance. In form it is most similar to the former. As either, it does not bar a subsequent action. It contains the words, "that plaintiff take nothing," just as did the traditional form of a judgment of *non prosequitur* or of discontinuance, as shown by the last quoted authority. In spite of that fact, neither of those judgments were held to bar another action. For the same reasons, the order dismissing the former suit in equity should not be held to bar the present action at law.

In view of the facts disclosed by the record of the former suit in equity and by the record of the case at bar, it plainly appears that the former suit was instituted under a misapprehension of the facts and in ignorance of the rights of third parties who had purchased from plaintiff in error. It further plainly appears that any irregularity in the text of the order dismissing that suit was an inadvertance on the part of the United States Attorney. It is patent that the attorney preparing that order never intended thereby to retract the plaintiff's claims of fraud on the part of the entryman, nor to confess a final judgment in his favor. On the question of actions brought under a misapprehension of plaintiff's rights, Black on Judgments, at Section 733, states the true rule as follows:

> "As we have already intimated, cases not infrequently arise in which a party acting upon a certain theory as to his legal rights, or as to the legal effects of a given state of facts or transaction, bring his action and is defeated, being unable to substantiate his view of the case, and afterwards renews the litigation, without any change in the facts, but basing his claim on a new and more correct theory. In such a case the former judgment is no bar to the second action. It is true the subject matter is the same, but the cause of action set up in the former suit was, as shown by the result, merely illusory and supposititious, and hence it cannot be considered as identical, in any just sense of the term, with the true cause of action correctly set up and supported by a right theory of the facts." (and illustrations there given.)

In *Haldeman et al.* vs. *United States*, 91 U. S. 584, it is held that in order that a judgment may constitute *res adjudicata*, (1) There must have been a right adjudicated or released in the first suit, and that *this fact must appear affirmatively*; (2) There must have been more than a judgment of dismisisal for want of prosecution.

In *Hopkins* vs. *Lee*, 6 Wheat. 109, it is held that the rule of estoppel by judgment does not apply to matters which can only be argumentatively inferred from the decree.

We submit that a dismissal upon motion of plaintiff is no more an adjudication on the merits than a dismissal for want of prosecution, and we further submit that the contention of plaintiff in error to the effect that the order of dismissal upon which he relies was an adjudication upon the merits, is, as shown by his brief, inferred from such order in a purely argumentative manner.

In *Hughes vs. United States*, 71 U. S. 232, the true rule of estoppel by judgment is stated as follows:

> "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, *or a misconception of the form of proceedings*, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

In *Lyon vs. Perin*, 125 U. S. 698, cited by plaintiff in error in support of his contention, the decree which was there held to be *res adjudicata* of the case under consideration, recited a submission of the pleadings to the Court for their consideration, and that *the equities were founded to be with the defendant*. The opinion further recites that a judgment of dismissal of a former bill is conclusive *only* when such judgment was rendered upon a hearing of the case. It will be perceived, therefore, that the last cited authority is not at all in point on plaintiff in error's proposition, while the other foregoing au-

thorities from the Supreme Court are directly in point to the contrary.

Finally, on this phase of the argument, we wish to make it very plain that we do not at all object to the rule which requires that a matter shall be finally adjudicated only once. But we do most pointedly object to the artificial construction of the order of dismissal involved in this appeal, which plaintiff in error asks this Court to adopt. That construction would change a simple, voluntary dismissal into a judgment rendered upon the merits after full hearing and consideration, would deny the defendant in error its day in Court, and would enable plaintiff in error to evade the verdict of a jury of his peers rendered after a full presentation of the facts involved in this case.

We submit that the learned trial Judge committed no error in overruling the special plea of *res adjudicata*.

CONCLUSION.

Before finally submitting this matter, we wish in conclusion to dwell briefly upon the propriety of this action. Plaintiff in error inveighs rather violently against the course taken by the United States and its officers, and refers to this action as having the appearance of a subterfuge or a trick calculated to reach an end regardless of the means employed. We feel that we should not allow such imputations to pass unchallenged.

It will be noted that this action is premised upon the charge that plaintiff in error and his witnesses defrauded the United States by falsifying their testimony offered in final proof under his homestead entry upon the public domain. The government and its officers undertook the burden of proving these charges

not only by a preponderance of the evidence, but by evidence which should be clear and convincing almost to the degree required in a criminal prosecution. Such is the rule in the proof of fraud. These charges and the evidence offered in support thereof have been submitted to a jury, in the selection of which plaintiff in error participated. That jury found that he was guilty of the fraud with which he was charged. He has had his day in Court and has enjoyed all of the benefits accruing to him by reason of the fact that he appeared as a defendant and by reason of the rule of law requiring strict and complete proof of the charge of fraud laid against him. It seems to us, therefore, that it does not lie in his mouth to accuse the government's agents of unfairness and lack of scruple in this matter.

Quoting from *Fenmore* vs. *United States*, 3 Dallas 233,

> "surely it ought never to have been a subject of argument in a court of justice, whether, on stating a manifest fraud practiced upon the public credit and treasury, the United States is entitled to recover an equivalent for the pecuniary injury, from the avowed delinquent."

And quoting again from *United States* vs. *Trinidad Coal & Coke Co.*, 137 U. S., 160,

> "in the matter of disposing of the vacant coal lands of the United States the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre, which is required from those desiring to obtain a title to such land, had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people; and in making regulations for the disposal of them Congress took no thought of their pecuniary value, but, in the discharge of a high public duty and in the interest of the

> whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value. The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions. * * * * The defendant is a wrong-doer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands."

Plaintiff in error should avoid the too common mistake of thinking of the government as something separate and independent from himself and his fellow citizens. Such is not the case. The officers of the government are as much the agents and servants of plaintiff in error as of any or all of his fellow citizens. In matters touching the disposal of public lands, those officers act in response to a correct and far sighted economic policy which has dictated that the public domain shall not fall into the hands of the few, there to be exploited under a system of private landlordism, but shall be held and disposed of for the benefit of the many, for all alike. The public domain is a vast trust fund, the protection of which is as much the duty of plaintiff in error as of any other citizen. A jury of his peers has found that plaintiff in error obtained a portion of that trust fund through fraud. Such being the fact, the rudiments of common justice demand that he should make adequate reparation as far as possible. He has, therefore, no valid reason to complain of the government's course in this matter.

Respectfully submitted,

J. L. McCLEAR,
United States Attorney, District of Idaho.

J. R. SMEAD,
Assistant U. S. Attorney, District of Idaho.
Attorneys for Defendant in Error.